PP

v.

GOPI KRISHNAN

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL TRIAL NO: 41-139-99]
23 FEBRUARY 2000

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Whether discount on sentence ought to be given when accused pleads guilty - Whether public interest outweighs mitigating factors - Purpose of discretion in imposing sentence*

The accused pleaded guilty to a charge of possession of drugs. For the purposes of sentencing, the counsel of the accused submitted the following as the plea in mitigation: the plea of guilty by the accused, the fact that his father had died while his mother worked and earned about RM600 per month. Also the fact the accused was an addict at the time and the quantity of drugs was for the use of his friends and himself. Furthermore, the accused was a first-time offender who had given full co-operation to the investigation. Lastly it was submitted that he regretted his offence, realising the hardship it had caused his family.

The Deputy Public Prosecutor ('DPP') in reply claimed that the offence is liable to life imprisonment and a minimum of ten strokes of the rotan and referred to the seriousness and frequency of the offence. The DPP argued the fact that the charge was reduced to possession was already a discount or credit to the accused for pleading guilty. The court was urged to take consideration of public interest. As to the personal interest of the accused he should have thought it out before committing the offence.

Held:

[1] The court may not take into consideration the sentence for any other offence with which the accused might have been charged, for example trafficking. The argument that there was already a discount or credit given to the accused because the charge has been reduced cannot therefore stand scrutiny in principled sentencing.

[2] The fact that an offender co-operates with investigations speaks volumes of the recognition and admission by him of his wrong-doing. That it is the accused's first offence shows not only no reason to doubt his sincerity, but also gives some hope that he would succeed in his

resolve to reform. Furthermore, he has a family, and has acknowledged the hardship he has caused them, and a working mother willing to make the sacrifice to come to court gives some confidence that he will get support to help him in his attempt towards a non-criminal way life.

[3] The severity of the offence may outweigh the mitigating effect of a guilty plea. Given the mitigating factors that the accused is an addict, and that he possessed the said drugs for consumption by himself and his friends, the offence is not so severe as to outweigh the mitigating effect of pleading guilty. There is no evidence that the accused has no defence to the charge such that his plea of guilty amounts to little more than an admission he has no defence rather than of true contriteness.

[4] The first and foremost consideration is always the public interest. Public interest manifests itself in a number of ways including deterring the accused from repeating a similar offence, inducing the accused to turn from a criminal to honest living and deterring others from committing a similar offence.

[5] It is natural but unfortunately superficial to equate a long sentence with a deterrent sentence. Such an assumption fails to recognise there are persons to whom a long prison sentence is not a deterrence, as much as there are persons to whom a short period of remand is more than enough deterrence. An addict is an example of such an exception. To satisfy his addiction he has to have possession of the drugs, and thereby commits an offence. For such an offender, a long or short sentence is of little difference from the point of view of deterrence to the addict, be it the person before the court or other addicts.

[6] A lifelong sentence, being a condemnation to society's dust heap of rejection, in this case, is clearly as inappropriate as a short sentence. Given all the mitigating factors other than the plea of guilty and that the quantity of drugs is not particularly large, a sentence of 12 years imprisonment and 18 strokes of the rotan would normally be appropriate. Giving a third of a reduction for pleading guilty which means a sentence of eight years and 12 strokes of the rotan.

[Order accordingly.]

Case(s) referred to:
Leo Say & Ors v. PP [1985] 2 CLJ 155 ***(refd)***
Loh Hock Seng v. PP [1980] 2 MLJ 13 ***(refd)***
Low Oi Lin v. Rex [1949] 15 MLJ 210 ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1988] 1 MLJ 167 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***

PP v. Low Kok Wai [1988] 3 MLJ 132 ***(refd)***
PP v. Nazarudin Ahmad & Ors [1993] 2 CLJ 543 ***(refd)***
PP v. Oo Leng Swee & Ors [1981] 1 MLJ 247 ***(refd)***
PP v. Teh Ah Cheng [1976] 2 MLJ 186 ***(refd)***
Raja Izzuddin Shah v. PP [1979] 1 MLJ 70 ***(refd)***
Reg v. De Simoni [1981] 147 CLR 383 ***(refd)***
Rex v. Kenneth John Ball [1951] 35 Cr App R 161 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Yap Teng Chai v. PP [1959] 25 MLJ 205 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 294
Dangerous Drugs Act 1952, ss. 37(da), 39A(2), 39B(1)(a), (2)

For the accused - Ameenuddin Ibrahim; M/s Ameen & Co
For the prosecution - Abdul Rahman Mohd Redza (Fatimah Zahari with him) DPP

Reported by Sherin Kunhibava

JUDGMENT

Abdul Wahab Patail J:

The Appeal

The public prosecutor has appealed against the sentence of eight years imprisonment and 12 strokes of the rotan passed upon the accused in respect of an offence of possession 6.51 gm of heroin and 19.30gm of monoacetylmorphine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) thereof.

The Facts Of The Case

The accused had pleaded guilty to the charge. The facts of the case submitted to the court by the public prosecutor is as follows:

1. Pada 27.1.1999, jam lebih kurang 7:30 malam, bertindak atas makiumat pengadu, Insp. Mohd Azam b. Abd. Razak bersama sepasukan anggota polis dari Jabatan Narkotik, Ibu Pejabat Polls Kontinjen, Kuala Lumpur telah membuat satu pemerhatian di jalan belakang Kedai No. 20, Jalan Pahang kerana disyaki terdapat aktiviti pengedaran dadah di kawasan tersebut.

2. Lebih kurang 20 minit kemudian iaitu kira-kira pukul 7:50 malam, sebuah motosikal jenis Yamaha SS 110 warna merah nombor pendaftaran WED 7647 yang dipandu oleh seorang lelaki India (OKT) telah memasuki kawasan pemerhatian.

3. OKT telah memberhentikan motosikalnya dibelakang kedai No. 20, Jalan Pahang dan mengambil satu bungkusan akhbar dan dalam raga motosikal tersebut.

4. Sebaik sahaja OKT turun dari motosikalnya, pengadu serta anggota menghampiri OKT dan memperkenalkan diri 'Polis'. Pada masa yang sama OKT melepaskan bungkusan akhbar yang dipegang dengan tangan kanannya dan terus melarikan diri ke dalam kedai.

5. Serentak, anggota terdiri daripada D/Kpl. 96478 dan L/Kpl. 108443 mengejar OKT masuk ke dalam kedai manakala pengadu mengambil bungkusan yang di1epaskan o1eh OKT dan turut serta mengejar OKT masuk ke dalam kedai.

6. Apabila pengadu sampai di bahagian hadapan kedai, beliau dapati OKT telah berjaya ditangkap dan OKT kemudian telah dibawa semula ke tempat kejadian (tempat bungkusan akhbar dilepaskan).

7. Di tempat kejadian, pengadu telah membuka bungkusan akhbar yang dilepaskan oleh OKT di depan OKT disaksikan oleh anggota-anggota polis didapati terdapat di dalamnya satu bungkusan plastik besar yang mengandungi serbuk dan ketulan kecil bahan berwarna merah jambu disyaki dadah heroin.

8. Pengadu merampas barang kes dan OKT ditangkap dan dibawa balik ke pejabat Narkotik, Ibu Pejabat Polis Kontinjen, Kuala Lumpur dan diserahkan kepada pegawai penyiasat Insp. Sharudin b. Yunos untuk tindakan lanjut. OKT dikenali sebagai Gopi a/l Balakrishnan KP: 780913-14-5141.

9. Barang kes yang dirampas telah dihantar ke Jabatan Kimia, Petaling Jaya pada 30.1.1999 untuk dianalisa dan resit rasmi penerimaan dan Jabatan Kimia telah dikeluarkan.

10. Hasil laporan kimia mengesahkan dadah yang dirampas adalah heroin seberat 6.51 gram dan monoacetylmorphines seberat 19.30 gram.

The Plea In Mitigation

In mitigation, counsel Mr. Ameenuddin bin Ibrahim submitted upon the act of pleading guilty as a mitigating factor. He submitted also upon the accused's background, that the accused being 20 years and 4 months old at the time of arrest, that his father had died in 1993 while his mother, who was present in court, works and earns about RM600 per month. The accused was an addict at the time and it as submitted the quantity of drugs was for the use of his friends and himself. The accused had been rehabilitated from his addiction after his arrest. He is a first offender who had given full co-operation as from his arrest. It was submitted that he regretted his offence, realising the hardship it had caused his family.

The Public Prosecutor's Reply

The learned deputy public prosecutor submitted that the offence is liable to life imprisonment and a minimum of ten strokes of the rotan. The learned deputy public prosecutor referred to the seriousness and frequency of the offence. He argued that the fact the charge was reduced to possession was already a discount or credit to the accused for pleading guilty. It was submitted on the basis of *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 that the court must take consideration of the public interest. He argued that as to his personal interest, the accused ought to have thought it out before committing the offence. The learned deputy public prosecutor conceded that the accused is a first offender.

The Sentencing Considerations

The crime with which the accused is charged is possession of dangerous drugs. The basis of sentencing must therefore be the sentence that can lawfully be passed under that charge, and no other. The court may not take into consideration the sentence for any other offence with which he might have been charged, for example, trafficking. The argument that there was already a discount or credit given to the accused because the charge has been reduced cannot therefore stand scrutiny in principled sentencing. This view was well expressed in *Reg. v. De Simoni* [1981] 147 CLR 383 at 389 where his Honour Gibbs CJ said:

> However, the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he had not been convicted ... The combined effect of the two principles ... is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.
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> The key to a principled approach to sentencing a person such as the applicant who has been convicted by a jury of conspiracy is to ensure that he is punished solely for the offence of which he stands convicted. This is the criminal agreement which constitutes the conspiracy and not the substantive offence.

The law fixes a maximum sentence, and sometimes a minimum also, but leaves a range that allows the court to exercise a discretion to be lenient or to be severe. As with all judicial discretion, it is to be exercised judiciously considering all of the facts and circumstances of the case. It is trite law that no plea in mitigation should be brushed aside lightly but

must in all fairness be examined and considered equally with the facts presented by the prosecution (see *Raja Izzuddin Shah v. PP* [1979] 1 MLJ 70). Valid matters to be considered for the offender include character, antecedents, age, health or mental condition, trivial nature of the offence or other extenuating circumstances. These considerations may in the case of a first offender, make it expedient that he be released on bond of good conduct, and to be brought for sentencing if he should breach the bond (see s. 294 Criminal Procedure Code). Even if he is not a first offender, these considerations remain matters to be considered in sentencing. But these are not the sole or primary considerations. As explained in *PP v. Loo Choon Fatt* [1976] 1 MLJ 256:

> Presidents and Magistrates are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused as seen as facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused. Lord Goddard LCJ in *Rex v. Gronkowski* offered some good advice when he said:
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> > The judge must consider the interests of justice as well as the interests of the prisoners. It is too often, nowadays, thought, or seems to be thought, that the interests ofjustice means only the interests of the prisoners.

This reflects the fundamental principle of sentencing stated in *Rex v. Kenneth John Ball* [1951] 35 Cr App. R. 161, where Hilbery J said:

> In deciding the appropriate sentence a court should always be guided by certain consideration. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn criminal way to honest living. Our law does not, therefore fix the sentence for a particular crime but it

> fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, that appropriate circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

The first and foremost consideration is always the public interest. That public interest manifests itself in a number of ways, including:

a) deterring the accused from repeating a similar offence;

b) inducing the accused to turn from a criminal to honest living; and

c) deterring others from committing a similar offence.

The nature, frequency and deliberateness of the offence (*Yap Teng Chai v. PP* [1959] 25 MLJ 205) may emphasise the need for a sentence to deter the accused from repeating and others from following a similar course. There are also offences that involve, in addition, a retributive element in sentencing, such as violence, to emphasise society's unequivocal rejection of such conduct, that under no circumstances is its commission tolerated. In *Low Oi Lin v. Rex* [1949] 15 MLJ 210, Taylor J said:

> There are certain factors such as prevalence, difficulty of detection and injury to the public revenue which operate in the direction of severity and others such as leniency to first offenders which operate in the other direction and where, as frequently happens, a number of these factors apply in one case the Court must balance them as best it can.

It is natural but unfortunately superficial to equate a long sentence with a deterrent sentence. Such an assumption fails to recognise there are persons to whom a long prison sentence is not a deterrence, as much as there are persons to whom a short period of remand is more than deterrent enough. An addict is an example of such exception. More often that not, in relation to the drug to which he is addicted, the addict is at least as much a victim as he is a felon. Such offences involve less contumelious or blameworthy conduct, committed in a state that gives little choice. Possession of dangerous drugs by an addict is one such offence committed in a state. Only too often it is the weak who succumb to drug addiction, and find it the hardest to fight it. To satisfy his addiction he has to have possession of the drugs, and thereby commits an offence. For such offender a long or short sentence is of little difference from the point of view of deterrence to the addict, be it the person before the court or other addicts. In the case of non-addicts, a longer sentence is warranted if the facts show he came into possession voluntarily, as in cases coming close to but not meeting the elements of trafficking. Whether a person charged and convicted with

possession of dangerous drugs is addicted to the drugs is therefore always a proper matter to be considered in the question whether a long sentence will have a deterrent effect.

The facts put forward by the prosecution shows custody, control and knowledge of the nature of the dangerous drugs in the carrier basket of the motorcycle he was riding. The charge is in respect of 25.81 gms of a combination of heroin and monoacetylmorphine. The quantity indicates the seriousness as it could justify the presumption under s. 37(da) of the Act for trafficking. The accused has explained that the drugs were for his own and his friends' consumption. This explanation was not contradicted by the prosecution, and it accounts for the reason why the charge has been reduced. Furthermore, it was not suggested by the prosecution that his friends were not addicts like him, such that he is a danger in tempting or causing his friends to become addicts also, in which case a very serious view ought to be taken.

Promises to reform, to turn over a new leaf to honest living are submissions heard too often in pleas of mitigation as to appear to be more ritual and has little credibility. It is however wrong for a court to dismiss any plea of mitigation, however weak it may sound, lightly. The court is charged with the responsibility and duty to consider the plea. Such consideration is made by considering the facts and circumstances of the case so as to assess the genuineness, sincerity and trustworthiness of that promise. That he has previous criminal record substantially demolishes the credibility of his promise. A persistent and dangerous offender no longer deserves leniency. On the other hand, that it is his first offence, as is confirmed by the prosecution in this case, shows not only no reason to doubt his sincerity, but also gives some hope that he would succeed in his resolve to reform.

The fact an offender co-operates with investigations speaks volumes of the recognition and admission by him of his wrong-doing. These are the first essential evidence of his sincerity in regretting his criminal action and to change his way of life to a law abiding citizen. It is strong persuasion to give the maximum benefit of discount or credit to his plea of guilty.

His assertion that he cooperated with police investigations was not contradicted by the prosecution. His plea of guilty is not inconsistent with the assertion that he cooperated with investigations. These actions are consistent with and supports his assertion that he has seen the error of his ways, regretted it, and wants to turn over to a new leaf. That he has a family, acknowledging the hardship he has caused them, and a working

mother willing to make the sacrifice to come to court gives some reason for confidence that he will get support to help him in his attempt towards a non-criminal way of life.

These elements show promise that he might, given this one chance, possibly succeed. The public interest is indeed best served if he does succeed. That chance should not therefore be lightly denied. He should be given that one chance before he is condemned to the society's dust heap of rejection.

Nevertheless, the serious and rampant nature of the offence prevents any consideration of the application of s. 294 of the Criminal Procedure Code in favour of the Accused (see *Public Prosecutor v. Teh Ah Cheng* [1976] 2 MLJ 186). Indeed *Leo Say & Ors v. PP* [1985] 2 CLJ 155, *PP v. Oo Leng Swee & Ors* [1981] 1 MLJ 247, *Loh Hock Seng v. PP* [1980] 2 MLJ 13 supports the view that the severity of the offence committed may outweigh the mitigating effect of a guilty plea. Given the mitigating factors above that the accused is an addict, that he possessed the said drugs for consumption by himself and his friends, and in the absence of any evidence that his friends are not addicts, the offence is not so severe as to outweigh mitigating effect of pleading guilty. There is no evidence that the accused has no defence to the charge such that his plea of guilty, as explained in *PP v. Low Kok Wai* [1988] 3 MLJ 132, amounts to little more than an admission he has no defence rather than of true contriteness. As such, in this case the accused should be given full credit for pleading guilty.

Nevertheless the responsibility and duty to pass a sentence that will deter him and others from considering the offence as a light offence remains. A term of imprisonment is clearly warranted. But in ordering a term of imprisonment, as in *PP v. Nazarudin bin Ahmad & Ors* [1993] 2 CLJ 543 the court should consider how the length of time spent in prison would affect young first offenders and society after they complete their sentence. Public interest sometimes demands that a short term of imprisonment be imposed as the prisoner would have difficulty in re-adjusting to family and community life if a longer term is imposed.

The offence is liable to imprisonment for life and a minimum of ten strokes of the cane. Section 39A(2) employs the mandatory 'shall be punished' in relation to the punishment for life, or a minimum of five years and a minimum of ten strokes. A lifelong sentence, being a condemnation to society's dust heap of rejection, in this case, is clearly as inappropriate as a short sentence. A substantial order of strokes of the rotan is a much less forgettable and more tactile reminder of punishment than any prison

sentence. Given all the mitigating factors other than of pleading guilty, and given that the quantity of drugs of 25.81 gms is not particularly large, a sentence of 12 years imprisonment and 18 strokes of the rotan would ordinarily be appropriate. Giving about a third reduction for pleading guilty (see *Sau Soo Kim v. PP* [1975] 2 MLJ 134 (FC), *Mohamed Abdullah Ang Swee Kang v. PP* [1988] 1 MLJ 167). I therefore ordered a sentence of eight years imprisonment and 12 strokes of the rotan.